Supreme Court, U. S.
FILED
DEC 24 1975
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-260

L. N. McDONALD and RAYMOND L. LAIRD,
Petitioners

v.

SANTA FE TRANSPORTATION COMPANY and TEAMSTERS FREIGHT, TANK LINE and AUTOMOBILE INDUSTRY EMPLOYEES, LOCAL UNION NO. 988,
Respondents

BRIEF ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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BRIEF FOR PETITIONERS

OPINION BELOW

The opinion of the Court of Appeals, a copy of which appears in the Appendix at pp. 120-122, is reported at 513 F.2d 90. The opinions rendered by the United States District Court for the Southern District of Texas are unreported and appear in the Appendix at pp. 113-117 and pp. 118-119.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on May 21, 1975, and this petition for certiorari was filed August 18, 1975, and granted on November 3, 1975. __U.S.__ (1975) The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 42

§2000e-2(a)(1) Unlawful employment practices—Employer practices

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;

United States Code, Title 42

§1981 Equal Rights under the law—

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

QUESTIONS PRESENTED

1. Whether dismissal of white employees charged with misappropriating company property while not dismissing a similarly charged black employee raises a claim under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e, *et seq.*

2. Whether white employees who were discharged for alleged misappropriation of company property when a similarly charged black employee was not discharged, have standing to sue under the Civil Rights Act of 1866, 42 U.S.C. §1981.

STATEMENT OF THE CASE

On September 26, 1970, Petitioners, who are white, were accused by the Respondent The Santa Fe Trail Transportation Company of having misappropriated certain of the Respondent's property. A black employee was similarly accused. On October 2, 1970, following an alleged investigation by the Respondent, the Petitioners were terminated but the black employee was not.

On October 8, 1970, Petitioner McDonald initiated a grievance in which the charges of misappropriation were emphatically denied.[1] On April 3, 1971, Petitioner McDonald was notified that his discharge had been sustained and that his grievance would not be further pursued by the Union Respondent.

On April 26, 1971, Petitioner McDonald filed Charges of Discrimination with the Equal Employment Opportunity Commission in which he charged that his race had been a factor in the employment decision of Respondents to discharge him.

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1. App. pp. 19-20.

On August 16, 1971, Petitioners initiated this action in the United States District Court for the Southern District of Texas, Houston Division. Invoking the Court's jurisdiction pursuant to 42 U.S.C. §2000e-5(f) and 42 U.S.C. §1981, Petitioners contended, *inter alia;* that they, along with a similarly situated black employee, had been charged by the Company with misappropriating company property; that subsequent to being so charged by the Company, Petitioners were discharged but the similarly situated black employee was not; that their discharge was without cause; and that they were discharged because of their race. In particular, Petitioners complained that the Company had imposed a more severe disciplinary sanction against them because of their race, Caucasian, and that this constituted a discriminatory preference in derogation those rights secured to Petitioners by Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e, *et seq.*, and the Civil Rights Act of 1866, 42 U.S.C. §1981. Additionally, Petitioners contended that Respondent Union had acquiesced in the company's racially discriminatory employment decision. Following discovery and certain motion practice, Petitioners filed their Second Amended Complaint on July 19, 1973.[2]

On January 4, 1974, the district court finding that petitioners had "alleged that the discharges were for racially discriminatory reasons", denied motions to dismiss. At issue in the motions were (1) the proposition of whether white persons may bring an action under 42 U.S.C. § 1981,[3] and (2) the proposition that Petitioners who were discharged following their apprehension for the alleged theft of their employer's property, while an

2. App. pp. 4-11 and 35-42.

3 App. pp. 92-93.

equally charged black employee was retained because of his race had not stated a claim under Title VII.[4]

On May 2, 1974, the district court issued a second Memorandum and Opinion in which it held that "[42 U.S.C.] §1981 is inapplicable to white persons"; additionally, the court held "[T]hat the dismissal of white employees charged with misappropriating company property while not dismissing a similarly charged Negro employee does not raise a claim upon which Title VII relief may be granted".[5]

The district court apparently predicated its decision in part, on the finding that Petitioners had failed to allege that they were falsely charged with misappropriating company property. This finding was adopted by the United States Court of Appeals for the Fifth Circuit.[6] In fact, evidence of each Petitioner's innocence of the charges of misappropriation had been squarely presented to the district court, see n. 37, *infra*.

On appeal to the United States Court of Appeals for the Fifth Circuit the panel held, *per curiam*, that 42 U.S.C. §1981 "confers no actionable rights upon white persons," and "that an employer's dismissal of white employees charged with misappropriating company property while not dismissing a similarly charged Black employee does not raise a claim upon which relief may be granted under Title VII, 42 U.S.C. §§2000e *et seq.*"[7]

4. App. p. 94.

5. App. pp. 103-108.

6. "There is no allegation that Plaintiffs were falsely charged." App. p. 122.

7. App. pp. 121-122.

Petitioners were never afforded an opportunity by the district court to offer evidence that (1) they were innocent of the accusations, or that (2) the not-discharged black employee was equally culpable, and that (3) race was a factor considered by Respondent Company in its decision to discharge Petitioners while retaining the similarly charged black employee.

SUMMARY OF ARGUMENT

It was the intent of Congress by the Civil Rights Act of 1964, to provide equal employment opportunities for all persons regardless of race and to condemn discriminatory preferences for either minority or majority employees. This Court has so held. *Griggs v. Duke Power Company*, 401 U.S. 424 (197). While an employer may justifiably discharge one who has engaged in unlawful conduct against it, Title VII requires that this criterion be applied alike to members of all races. This Court has so held. *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973). When an employee alleges that he has been the victim of discriminatory disciplinary treatment, he must be afforded a fair opportunity to show that the employer's action was pretextual or discriminatory in its application. This Court has so held. *Id.* at 807.

It was the clear intent of Congress by enacting the Civil Rights Act of 1866 to confer the rights, privileges and immunities contained therein upon whites as well as blacks. *Hollander v. Sears, Roebuck & Company*, 392 F. Supp. 90 (D. Conn. 1975); Cong. Globe, 39th Cong. 1st Sess. 599 (1866). A careful analysis of decisions of this Court and the better reasoned opinions of the lower courts supports this proposition.

Allowing whites standing to redress invidious, non-remediating discrimination under Title VII and 42 U.S.C. §1981 will not interfere with the salutory purposes of affirmative action.

Reversal, with directions that a trial on the merits be conducted under both Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq. and Section 1 of the Civil Rights Act of 1866, 42 U.S.C. §1981 is required.

ARGUMENT

I.

DISMISSAL OF WHITE EMPLOYEES CHARGED WITH MISAPPROPRIATING COMPANY PROPERTY WHILE NOT DISMISSING A SIMILARLY CHARGED BLACK EMPLOYEE RAISES A CLAIM UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED, 42 U.S.C. §§2000e, ET SEQ.

Prompted by this Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), and the growing civil rights movement, Congress began to enact comprehensive legislation designed to promote *practical* racial equality. In particular, Congress enacted Title VII of the Civil Rights Act of 1964,[8] to assure equality of employment opportunities for *all* persons. This coalescence of congressional, judicial and social pressure has in turn propelled our society into a social transformation, the end result of which must be true racial equality, not merely the hollow promise of equality in law, but racial equality in fact.

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8. Pub.L. 88-352, Title VII, § 701, July 2, 1964, 78 Stat. 253; Pub.L. 89-554, § 8(a), Sept. 6, 1966, 80 Stat. 662; Pub.L. 92-261, § 2, Mar. 24, 1972, 86 Stat. 103, now 42 U.S.C. § 2000e, *et seq.*

Yet, as might be expected in any rapid social change, this metamorphasis has not been without unintended consequences.

Now, for the first time, this Court is being confronted with white persons seeking to invoke the protection of Title VII of the Civil Rights Act of 1964 and the Civil Rights Act of 1866,[9] alleging that they were the victims of a racially discriminatory employment decision; to date their efforts have been thwarted.[10] Congress did not intend such a result.

A. The Courts Below Clearly Disregarded Congressional Intent and Decisions of This Court in Finding That Petitioners had Failed to State a Claim Under Title VII of the Civil Rights Act of 1964, as Amended, 42 U.S.C. §§2000e, et seq.

Meager specific Congressional guidance[11] is available to assist this Court in resolving *precisely who* is covered by the Civil Rights Act of 1964. It is well settled that blacks,[12] chicanos,[13] and women[14] are embraced by its

9. Act of April 9, 1866, Ch. 31, ¶1, 14 Stat. 27, re-enacted by § 17 of the Enforcement Act of 1870, Act of May 31, 1870, Ch. 114, § 18, 16 Stat. 140, 144 and codified in §§ 1977, 1978 of the Revised Statutes of 1874, now 42 U.S.C. §§ 1981, 1982.

10. See, Memorandum and Opinion of the District Court, May 2, 1974, App. pp. 103-107; and the Opinion of the United States Court of Appeals for the Fifth Circuit, App. pp. 120-122.

11. *Espinoza v. Farah Manufacturing Company, Inc.*, 414 U.S. 86, 88 (1973).

12. *Albemarle Paper Company v. Moody*, ____U.S.____, 45 L.Ed.2d 280 (1975); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

13. *Espinoza, supra* n. 11.

14. *Phillips v. Martin-Marietta Corp.*, 400 U.S. 542 (1971).

terms. Apparently unresolved to this day is whether Title VII protects not only those who for decades have suffered employment discrimination but also those who are nominally well ensconced in the American economy, the white male.

While few courts have addressed the issue, Petitioners submit that this Court laid to rest all such ambiguity when it announced:

> Discriminatory preference for any group, minority *or majority*, is precisely and only what Congress has proscribed. (emphasis supplied)

Griggs v. Duke Power, 401 U.S. 424, 431 (1971). Accord, *Marquez v. Ford Motor Co.*, 440 F.2d 1157, 1163 (8th Cir. 1971).

The paucity of decisions addressing the issue of the standing of white persons *qua* white persons under Title VII is attributable to the fact that whites have not heretofore suffered,[15] nor are they presently emerging from, decades of employment discrimination. There exist few reported opinions where whites have successfully asserted violations of Title VII.[16] However, most decisions do not

15. One District Court, in *dicta* has found that whites are covered by Title VII and predicted that they will seek its protection.

> ". . . it was passed to help whites as much as blacks if their civil rights are being violated, and this court can foresee where in many situations, now and in the future, that whites will be asking for protection of Title VII of the Civil Rights Act of 1964."

United States v. International Longshoremen's Assoc., 334 F. Supp. 97, 979 (S.D. Tex. 1971) rev'd on other grounds *sub nom., EEOC v. International Longshoremen's Assoc.*, 511 F.2d 273 (5th Cir. 1975), cert. denied ____U.S.____ (No. 75-356, Dec. 2, 1975). Accord. *Ripp v. Dobbs House, Inc.*, 366 F. Supp. 205 (N.D. Ala. 1973).

16. See, e.g., *Parks v. Brennan*, 389 F. Supp. 790 (N.D. Ga. 1974) rev'd on other grounds *sub nom. Parks v. Dunlop*, 517 F.2d 785 (5th Cir. 1975).

turn on the question of standing but rather on general findings that the plaintiffs have not been discriminated against because of their race.[17] Implied in each case is that on a showing of racial discrimination relief would have been considered. White plaintiffs have successfully asserted rights paralleling those of Title VII under other provisions of the Civil Rights Act of 1964.[18]

Curiously, the courts below[19] and two other district courts[20] have chosen to ignore this Court's finding in *Griggs, supra,* and have erroneously concluded that white persons lack standing to assert violations of Title VII.

Mr. Justice Douglas had no reservations as to the scope of this Court's holding in *Griggs;* in his dissent from this Court's ruling in *Espinoza, supra,* he stated:

> But whether brown, yellow, *black or white,* the thrust of the act is clear . . . Griggs . . . *extends its*

17. *David F.X. Smith v. John Gunther,* _____F. Supp._____, 9 EPD ¶9915 (D.C. D.C. 1975); *Bellamy v. Mason Stores, Inc.,* 368 F. Supp. 1025 (D.C. Va. 1973). *Cf. Rios v. Enterprise Association of Steamfitters, Local 638,* 520 F.2d 352 (2nd Cir. 1975). The Court indicated that had the whites suffered "reverse discrimination" they would be on sounder footing; *U.S. v. Bethlehem Steel Corporation,* 446 F.2d 652, (2nd Cir. 1971). ". . . there was no proof that Bethlehem rejected any white applicants . . . on the basis of . . . national origin". 446 F.2d at 665; *Phillips v. Columbia Gas of West Virginia, Inc.,* 347 F. Supp. 533 (D.C. W. Va. 1972) aff'd 474 F.2d 342 (4th Cir. 1973).

18. E.g., *Anderson v. San Francisco Unified School District,* 357 F. Supp. 248 (N.D. Cal. 1972). White plaintiffs successfully prosecuted racial discrimination charge pursuant to Title VI, 42 U.S.C. 2000d.

19. See, n. 10, *supra.*

20. *Haber v. Klassen,* _____F. Supp._____, 10 FEP Cases 1446 (N.D. Ohio, 1975); *Mele v. United States Department of Justice,* _____F. Supp._____, 10 EPD ¶10,258 (D.C. N.J. 1975).

> *protective principles to all, not to blacks alone.* (emphasis supplied).

414 U.S. at 97.

Moreover, the Equal Employment Opportunity Commission has expressly recognized the standing of whites to complain of racially motivated job discrimination.[21] Citing *Griggs,* the Commission has held:

> To find that [similar] recruiting methods are violative of Title VII only where Caucasians occupy the favored position (footnote omitted) would constitute a derilection of the Congressional mandate to eliminate all practices which operate to disadvantage the employment opportunities of any group protected by Title VII, *including Caucasians.*[22] (Emphasis supplied).

CCH EEOC Decision No. 74-31 ¶6404 (1973).

While in the majority of instances the Commission has found that there was "no probable cause" to believe that Title VII had been violated,[23] it has never quailed from its duty to condemn racial discrimination directed at

21. As the federal agency charged with enforcing the provisions of Title VII this Court has recognized that their interpretations of the Act are entitled to great deference. *Griggs v. Duke Power Co., supra* at 433.

22. See, CCH EEOC Decision No. 74-95 ¶6432 (1974) n. 4.

23. CCH EEOC Decision No. 75-019 ¶6465 (1975);
CCH EEOC Decision No. 75-274 ¶6454 (1975);
CCH EEOC Decision No. 75-269 ¶6453 (1975);
CCH EEOC Decision No. 75-215 ¶6449 (1975);
CCH EEOC Decision No. 75-040 ¶6440 (1974);
CCH EEOC Decision No. 75-037 ¶6437 (1974);
CCH EEOC Decision No. 74-10 ¶6391 (1973).

whites even when such discrimination is in the name of "affirmative action".[24]

While the Commission's interpretation of the statute is entitled to great deference, that deference is limited if the Commission's interpretation does not conform with clear congressional intent. *Espinoza, supra,* 414 U.S. at 94. However, regarding the applicability of Title VII to white persons, the EEOC's interpretation perfectly mirrors the intent manifested by Congress during its long and arduous debates of the early 1960's.

While Congress did not dwell at length on the matter of the applicability of Title VII to white persons, virtually every time the question was raised, the answer emphasized that the Act prohibits *all* racial discrimination. Responding to the charge that the Act seemed to compel an employer to grant preferential treatment to minorities, Senator Williams remarked:

> Those opposed to H.R. 7152 should realize that to hire a Negro solely because he is a Negro is racial discrimination, just as much as a "white only" employment policy. *Both forms of discrimination are prohibited by Title VII of this Act.* The language of that title simply states that race is not a qualification for employment. Every man must be judged according to his ability. In that respect, all men are to have an equal opportunity to be considered for a particular job. Some people charge that H.R. 7152 favors the Negro, at the expense of the white majority. But how can the language of equality favor one race over another? Equality can have only one

24. CCH EEOC Decision No. 75-268 ¶6452 (1975);
CCH EEOC Decision No. 74-106 ¶6427 (1974);
CCH EEOC Decision No. 74-26 ¶6398 (1973);
See also, *Anderson, supra* n. 18.

> meaning, and that meaning is self-evident to reasonable men.

Legislative History of Titles VII and XI of the Civil Rights Act of 1964, United States Equal Employment Opportunity Commission, U.S. Government Printing Office. 1969 p. 3189.

Again, during floor debate, Congressman Celler,[25] observed with considerable acuity, that the Act applied to whites as well as blacks:[26]

> Mrs. Griffiths: Before I begin my argument, however, I would like to ask the chairman of the Committee on the Judiciary, the gentleman from New York a question.
> Mr. Chairman, is it your judgment that this bill will protect colored men and colored women at the hiring gate equally?
>
> Mr. Celler: This bill is *all-embracing and will cover everybody in the United States.*
>
> Mrs. Griffiths: It will cover every colored man and colored woman?
>
> Mr. Celler: *Yes, it will cover white men and white women and all Americans.*[27] (Emphasis supplied)

Id. at 3217

25. Chairman of the House Committee on the Judiciary.

26. The colloquy developed during House debate on an amendment proposed by Congressman Smith of Virginia to prohibit discrimination based on sex.

27. In further discussions with Mrs. Griffiths, the Congressman refused to waiver:

> Mrs. Griffiths: Could a white woman, turned away from the college or from the restaurant where all the employers were white invoke the act? Would a white woman have any recourse under the Act?
>
> Mr. Celler: I think we covered that in colloquies we had in the earlier part of the afternoon. *There could be discrimina-*

Significantly, Congressman Celler's interpretations were confirmed by Senators Clark and Case in their interpretative memorandum:[28]

> There is no requirement that an employer maintain a racial balance in his work force. On the contrary, any deliberate attempt to maintain a racial balance, whatever such a balance may be, would involve a violation of Title VII because maintaining such a balance would require an employer to hire or refuse to hire on the basis of race. *It must be emphasized that discrimination is prohibited as to any individual.*[29]

Id. at 3040.

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tion against white people and there could be against colored people.

Mrs. Griffiths: Mr. Chairman, you know well and good if every employee of that restaurant were white, that that woman cannot go to the FEPC or to a district attorney and say "I was turned away from there because I was white" because every employee is white there.

Mr. Celler: That is specu'ation. Of course, that may be due to the derelictions of the particular Government agency; and *if there are such cases, there is discrimination, and I think we, as members of Congress, should all complain if it happens. Legislative History of Titles VII and XI of the Civil Rights Act of 1964, supra,* at 3218. (emphasis supplied)

28. Senators Clark and Case were the floor managers for the House bill in the Senate. Their memorandum was introduced into the Congressional record on April 8, 1964.

29. Early in the Senate debate on the House bill, Senator Clark received a number of objections to the bill, one of which is germane to the issue:

> Objection: Many employers will lean over backwards to avoid discrimination against other employees, increasing the case volume.

to which Senator Clark replied, in part:

> In addition, the Commission has a *clear mandate* to engage in widespread educational and promotional activities to encourage understanding of the policy of the Act, *including the obligation not to discriminate against whites.*
>
> *Id.* at 3015

In light of this clear Congressional intent, it cannot be gain-said that the EEOC has given practical effect to Congressional mandate by giving even-handed consideration to the complaints of the majority as well as the minority. The forged intent of Congress and the decisions of the Commission founded on that intent, demand that this Court lay to rest any remaining conflict among the lower courts. Only a compounding of already hopeless confusion can result if this Court fails to squarely address the issue.[30]

Inconsistent notions of the meaning of Title VII among the Judiciary and the Executive will doubtless recur if the case *sub judice* is not remanded. It appears that two different panels of the same Circuit Court of Appeals have arrived at different conclusions regarding the standing of white persons under Title VII.[31]

A number of wrongs have been righted in the decade since Title VII became law. To deny the salubrious aspects

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30. This confusion in the lower courts is best illustrated by *Haber v. Klassen, supra,* n. 20. In *Haber* the District Court erroneously relied on the first of the four "prima facie case" criteria (e.g. that he belongs to a racial minority) in *McDonnell Douglas Corp. v. Green, supra,* and held that,

> "Members of the white race may not seek relief for racial discrimination, under Title VII . . .". *Haber, supra,* 10 FEP Cases at 1447

Haber, the unsuccessful white Title VII plaintiff has Appealed to the United States Court of Appeals for the Sixth Circuit. *Haber v. Klassen*, No. 75-2158. The defendant-appellee, represented by the United States Department of Justice, on October 8, 1975, filed a "Suggestion of Remand" in which it urges that the district court has misconstrued Title VII.

The "Suggestion of Remand" is instructive and is included as Appendix A.

31. Compare, *McDonald v. Santa Fe Trail Transportation Co.*, 513 F.2d 90 (5th Cir. 1975) with *Parks v. Dunlap,* 517 F.2d 785 (5th Cir. 1975).

of the Act to a generation of persons — and their progeny — whose prejudices have only recently been overcome, is not only inconsistent with prior judicial pronouncements of this Court and Congressional intent, it is morally wrong. This Court must unequivocally give Title VII its intended breadth[32]— equality to all people.

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32. While there remains a dearth of case authority dealing with the definitional parameters of the term "race" as used in the Act, the courts below have examined the issue of whether Congress intended to provide males with a cause of action for sex discrimination. *See, e.g., Diaz v. Pan Am World Airways, Inc.*, 442 F.2d 385 (5th Cir. 1971), *cert. denied*, U.S. 950; *Burns v. Rohr Corp.*, 346 F. Supp. 994 (S.D. Cal. 1972). The analogy is useful. In *Diaz, supra*, the Fifth Circuit was faced with the claim of males who were admittedly "locked-out" of certain job classifications because of their sex. In considering whether the job required a female and thus was a bona fide occupational qualification within the meaning of the Title VII, the Court pointed out the underlying basis for finding that both men and women are protected by the Act:

> The Amendment adding the word "sex" to "race, color, religion and national origin" was adopted one day before House passage of the Civil Rights Act. It was added on the floor and engendered little relevant debate. In attempting to read Congress' intent in these circumstances, however, it is reasonable to assume, from a reading of the statute itself, that one of Congress' main goals was to provide equal access to the job market for both men and women. Indeed as this Court in *Weeks v. Southern Bell Telephone and Telegraph Co.*, 5 Cir., 408 F.2d 228 at 235 clearly stated, the purpose of the Act was to provide a foundation in law for the principle of nondiscrimination. Construing the statute as embodying such a principle is based on the assumption that Congress sought a formula that would not only achieve the optimum use of our labor resources but, and more importantly, would enable individuals to develop as individuals.

Diaz, supra at 386-387.

As the Fifth Circuit properly construed the term "sex" to encompass both men and women, so this Court must construe "race" to include whites as well as blacks; anything less would mock the concept of racial equality.

B. An Employer's Allegation of Unlawful Conduct does not Obviate the Prescribed Neutrality which must Govern Every Employment Decision.

The touchstone in all Title VII[33] litigation brought pursuant to § 703(a)(1) of the Act is "whether *for any reason,* a racially discriminatory employment decision has been made". *McDonnell-Douglas Corp., supra* at 800. Defining discrimination in its broadest possible terms,[34] "Congress chose neither to enumerate specific discriminatory practices, nor to elucidate *in extenso* the parameter of such nefarious activities". *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971), cert. denied 406 U.S. 957. (1972)

Enacted "to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, . . ." *Alexander v. Gardner-Denver Co., supra* 415 U.S. at 41, Title VII prohibits all racial discrimination in every aspect of employment regardless of degree or form. *Rowe v. General Motors Corp.*, 457 F.2d 348, 354 (5th Cir. 1972). It operates to negate an employers prerogative to make any rules or decisions which are predicated, in whole or in part, on race.

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33. And, apparently in all 42 U.S.C. § 1981 litigation seeking to redress employment discrimination. *Johnson v. Railway Express Agency*, ____U.S.____, 144 L.Ed.2d 295 (1975).

34. Senators Clark and Case in their interprative memorandum analyzed the concept of discrimination:

> To discriminate is to make a distinction, to make a difference in treatment or favor, and those distinctions or differences in treatment or favor which are prohibited by § 704 are those which are based on . . . race . . .

Legislative History of Titles VII and XI of the Civil Rights Act of 1964, supra, at 3040.

See, *McDonnell-Douglas Corp., supra* at 804; *accord, Windsor v. Bethesda General Hospital*, 523 F.2d 891 (8th Cir. 1975); *Sanders v. Dobbs House, Inc.*, 431 F.2d 1097 (5th Cir. 1970) cert. denied, *sub nom, Dobbs Houses, Inc., v. Sanders*, 401 U.S. 948 (1971).

EEOC Guidelines require an investigation to determine whether similarly situated employees of different races have received dissimilar treatment because of their race. Critical to the investigation is whether the charged employer has been fair and evenhanded in meting out discipline.[35] See, CCH EEOC Decision No. 75-269 ¶6453 (1975. Federal courts facing claims of racially disparate disciplinary treatment have adopted this criteria, *McRae v. Goddard College* ____ F. Supp. ____ 10 FEP Cases 143, 149 (D.C. Vt. 1975); and the employer's decision to terminate an employee whether for inefficiency, *Long v. Ford Motor Company*, 496 F.2d 500 (6th Cir. 1974); *Alexander v. Gardner-Denver Co., on remand*, 8 FEP 1153, aff'd 519 F.2d 503 (10th Cir., 1975), or for violating company rules, *Martin v. Chrysler Corporation*, ____F. Supp.____ 10 FEP Cases 329 (E.D. Mich. 1974), becomes limited by the "dissimilar treatment" test.[36]

In finding that Petitioners had failed to state a claim the lower courts relied heavily on the erroneous finding that Petitioners had not denied the allegations of theft.[37]

35. BNA Labor Relations Reporter, *Fair Employment Practices Manual*, The Bureau of National Affairs, Inc., § 421:102 (1975).

36. See, e.g., *Freeman v. Xerox Corp.*, 49 A.D. 2d 21 (S.Ct. N.Y. 1975); Accord, *Windsor v. Bethesda General Hospital*, 523 F.2d 891 (8th Cir. 1975).

37. Both the court of appeals and the district court found that

Assuming *arguendo* that Petitioners had not denied the allegations of theft as the lower courts concluded, they were nonetheless entitled to make out their *prima facie* case of discrimination by showing at trial, *inter alia*,[38] that a similarly charged black employee had not been discharged.[39] "Petitioner may justifiably refuse to [rehire] one who was engaged in unlawful, disruptive acts against it, but *only* if this criterion is applied alike to members of all races", *McDonnell-Douglas, supra,* at 804.

The reasoning of the court below is fallacious insofar as it relies on this Court's holding in *McDonnell-Douglas Corp., supra.*[40] to support its decision. There, the Court

Petitioners' pleadings did not allege that they were falsely charged. See, App. p. 122 and p. 117.

While admittedly inartfully drawn, Petitioners' Complaint charged that they "were discharged by Defendant Santa Fe Trail Transport Company *without cause* . . .". See, App. p. 38. The Complaint was a verified pleading, thus any reasons advanced by the Respondent for Petitioners discharges were necessarily refuted *ab initio*.

Petitioners McDonald expressly denied the charges in a grievance submitted to the district court by Respondent Local 988.

> "These [C]harges are wrong and are unjust, because I did not steel [sic] anything . . ."

App. p. 19.

It is not even clear that Petitioner Laird was discharged for allegedly unlawful conduct. In its verified answers to interrogatories, Respondent Santa Fe submitted:

> "Raymond Lee Laird was discharged for failure to properly perform his duties, exercising poor judgment as General Dock Foreman and for violation of company rules." App. p. 32.

38. Petitioners were not afforded an opportunity to demonstrate their innocence. The action was dismissed pursuant to Rule 12(b) of the Federal Rules of Civil Procedure.

39. No criminal charges were ever filed against Petitioners.

40. The court below also relied on certain cases arising under the National Labor Relations Act. 29 U.S.C. § 151, *et seq. NLRB v. Fansteel Metalurgical Corp.*, 306 U.S. 290 (1939); *Nix v. NLRB*, 418 F.2d 1001, 1006 (5th Cir. 1969); *AHI Machine Tool & Die,*

stated: "Disciplinary action for offenses not constituting crimes is not involved in this case." App. p. 122. The court's reliance was misplaced. In *McDonnell-Douglas,* the complaining party was a confessed misdemeanant. 411 at 795. He alleged that his failure to be rehired was discriminatory; the Company, as the Respondents here, alleged that the failure to rehire was justified by petitioners unlawful conduct. In *McDonnell-Douglas,* the former employee alleged that Title VII was violated because the Company's refusal to rehire him was pretextual to a discriminatory intent. Here, Petitioners allege that a similarly charged black employee was not discharged[41] in violation of Title VII. A prima facie case of discriminatory application of an employment policy

Inc. v. NLRB, 432 F.2d 190 (6th Cir. 1970). These cases are inapposite.

In *Nix, supra,* and *AHI Machine Tool & Die, Inc., supra,* the Courts of Appeals had before them complete records, including witness testimony and Findings of the Trial Examiner; and in both cases relied heavily on the well-developed records in finding that the complained of discharges were not pretextual. Furthermore, and perhaps more importantly, the National Labor Relations Act, grants employees rights to organize and engage in certain concerted activities in order to improve the terms and conditions of their employment; Title VII, on the other hand, is prophylactic in its effect. It neither grants rights to employees nor proscribes their activities; its only function is to require employers to conform their employment practices to the mandates of the Constitution of the United States. See, Legislative History of Titles VII and XI, *supra* at 2009 and 2026. § 703(a)(1) of Title VII is silent as to "protected activities". This Court should not now engraft on to the face of Title VII those restrictions peculiar to the National Labor Relations Act. For, while it is clear that ". . . conduct which is not protected concerted activity may lawfully form the basis for the participants discharge. [*T*]*hat does not mean that the discharge is immune from attack on other statutory grounds in the appropriate case.*" (Emphasis supplied). *Emporium Capwell Co. v. Western Addition Community Organization.* ____U.S.____, 43 L.Ed.2d 12, 29 (1975).

41. See Brief, *supra,* p. 4.

has been alleged; "Especially relevant to such a showing would be evidence that [white] employees involved in acts against petitioner of comparable seriousness. . were nevertheless retained. . .". 411 at 804.

Here, as in *McDonnell-Douglas,* Petitioners were not afforded the opportunity to demonstrate that Title VII had been violated. In the case *sub judice,* the absence of any plenary hearing requires a reversal and a remand, since:

> [Respondent] must be afforded a fair opportunity to demonstrate that [petitioner's] assigned reason for refusing to re-employ was a pretext or *discriminatory in its application.* (Emphasis supplied)

Id. 411 at 807.

In *McDonnell-Douglas* this Court resolved the question of whether a mere allegation by the employer of "unlawful activity" is not conduct that is protected by §703 of Title VII in the negative; the Fifth Circuit's Opinion here draws distinction without a difference. The language of §703 (a)(1) is broad, and embraces every employment decision, Petitioners "should have been accorded the right to prepare [their] case with the knowledge that the §703 (a)(1) cause of action was properly before the District Court." *McDonnell-Douglas, supra* at 800.

The facts present here stand foresquare with those in *McDonnell-Douglas.*[42] For this Court to hold, on these facts, that the mere allegation of criminality by the Respondents would place Petitioners without the zone of

42. Bearing in mind however that Petitioners have never admitted guilt, nor have criminal charges ever been filed against them. See n. 37, *supra.*

"protected activities" would assuredly cause Title VII to collapse into the very evil it seeks to cure. [43]

II.

WHITE EMPLOYEES WHO WERE DISCHARGED FOR ALLEGED MISAPPROPRIATION OF COMPANY PROPERTY WHEN A SIMILARLY CHARGED BLACK EMPLOYEE WAS NOT DISCHARGED HAVE STANDING TO SUE UNDER THE CIVIL RIGHTS ACT OF 1866, 42 U.S.C. §1981.

This Court is becoming increasingly confronted with scattered occurrences of invidious racial discrimination directed against *white* persons. This relatively new form of racial discrimination has been manifested in a variety of situations. For instance, in some cases, blacks have been found to have interferred with the rights of white persons to hold and use property. *E.g., Gannon v. Action,* 303 F.Supp. 1240 (E.D. Mo. 1969), aff'd in part, remanded in part on other grounds, 450 F.2d 1227 (8th Cir. 1971).

Situations have also arisen where white persons, because of their race, have had their rights to contract for employment infringed. *E.g., Hollander v. Sears, Roebuck & Company,* 392 F.Supp. 90 (D. Conn. 1975); and, of course, the fact situation now before the Court is another

43. If the employer is able to avoid the sanctions of Title VII by merely asserting "crime" this would deliver him Carte Blanche authority to engage in wholesale discrimination without fear of administrative or judicial reprisal. Thus, under circumstances where, for example, five blacks and five whites, all involved in the same crime, pleaded guilty to theft from their employer, he could exercise his new license to discriminate by freely discharging all five blacks while retaining all five whites. Clearly, Congress did not intend such a result.

example of racial discrimination against white persons in employment. Racially disparate discipline by an employer for similar or identical alleged employee misconduct gives rise to a cause of action under 42 U.S.C. §1981.[44]

Obviously, there exists a clear need to accord white persons protection against racial discrimination. The legislation necessary to protect white persons when they are the victims of invidious racial discrimination in employment is already in force; all that is needed is an even-handed application of the Civil Rights Act of 1866, 42 U.S.C. §1981. This Court has already held that §1981 provides a cause of action against private racial discrimination. *Johnson v. Railway Express Agency,* ____ U.S.____, 44 L.Ed. 295, 301 (1975). Thus, all that remains is for this Court to fulfill the promise of the Act that *all* men shall be protected from invidious racial discrimination in their exercise of It's enumerated rights.

A. The Language of the Statute Compels the Conclusion that White Persons Have Standing to Sue Under 42 U.S.C. §1981.

The clearest indication that 42 U.S.C. §1981 was intended to protect white persons as well as non-whites is found on the face of the statute itself:

> §1981. Equal rights under the law.
>
> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of

44. *Windsor v. Bethesda General Hospital,* 523 F.2d 891 (8th Cir. 1975).

> persons and property as is enjoyed by white persons, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.[45]

The terms of the statute fairly defy a narrow "blacks only" construction, for with its opening words §1981 declares its protection to "*All* persons within the jurisdiction of the United States". This broad sweeping language necessarily embraces white persons. *Baca v. Butz,* 394 F. Supp. 888, 890 n. 4 (D.C. N. Mex. 1975) Nor is the protection accorded by §1981 restricted to non-whites by the later appearing phrase, "as is enjoyed by white citizens". The phrase is simply an effort to *quantify* the rights to be enjoyed by "all persons". It is merely a convenient measuring stick against which the rights of "all persons" are compared, and does not preclude whites from coverage under §1981 since whites themselves may be denied rights which are normally available to members of their race, *Hollander v. Sears Roebuck & Co.,* 392 F. Supp. 90, 94 (D. Conn. 1975); see, *Baca v. Butz, supra* at 890

45. In its original form, 42 U.S.C. § 1981 was part of § 1 of the Civil Rights Act of 1866, *Jones v. Alfred H. Mayer Co.,* 392 U.S. 409, 422 (1968). That section provided:

> *Be it enacted by the Senate House of Representatives of the United States of America and Congress assembled,* that all persons born in the United States and not subject to any foreign power, * * * are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, * * * shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, to be parties, and give evidence to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as if enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to note other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

n. 3. This is demonstrated by the racially discriminatory discharge to which your Petitioners were subjected by a fellow Caucasian. See Plaintiff's [sic] Second Amended Complaint, App. pp. 35-42.

The plain purpose of §1981 is to provide for equality of rights as between persons of different races, *Georgia v. Rachel,* 384 U.S. 780, 791 (1966); *Agnew v. City of Compton,* 239 F.2d 226, 230 (9th Cir. 1956), cert. denied, 353 U.S. 959 (1957). To construe this phrase so as to deny white persons the protection of §1981 would be to give the statute a construction in contravention of the clear intent of the statute to end invidious racial distinctions.

In fact, the phrase "as is enjoyed by white citizens", far from being of substantive importance, was regarded by Congress as superfulous language, the omission of which would in no way alter the substance of the statute. *See,* Cong. Globe, 39th Cong., 1st Sess. 1412 (1866), (Remarks of Senator Trumbull). The phrase was added by the House only "to emphasize the racial character of the rights being protected" *Georgia v. Rachel, supra* at 791; and as such was merely cosmetic. Clearly, therefore, the protection extended to all persons, and thus to all races, in the first nine words of the statute remains unqualified by the phrase "as is enjoyed by white citizens".

B. The Legislative History of the Civil Rights Act of 1866, Reveals That 42 U.S.C. §1981 was Intended to Protect White Persons as Well as Non-Whites.

Looking beyond the face of the statute, to the legislative history of the Civil Rights Act of 1866, only confirms

that Petitioners have standing to sue under §1981. Granted that the act was passed primarily to aid recently freed slaves, it is nevertheless clear that from its inception the Act was intended by contemporaries to protect white persons as well as blacks. This is initially evident from the fact that the Act was passed to implement the Thirteenth Amendment which itself was intended to benefit whites as well as the Negro. *See, Buchanan, The Quest for Freedom: A Legal History of the Thirteenth Amendment,* 12 Hous. L. Rev. 1, 7-14 (1975) (hereinafter cited as *Buchanan*).

The Act was introduced on January 5, 1866, as a bill "to protect *all persons* in the United States in their civil rights and furnish the means of their vindication" by Senator Lyman Trumbull of Illinois, Chairman of the Senate Judiciary Committee and a principal draftsman of the Thirteenth Amendment. (emphasis supplied). *Cong. Globe,* 39th Cong., 1st Sess. 129 (1866). Designated as Senate Bill Number 61, the bill was the measure which gained Republican support after several previous attempts at comprehensive civil rights legislation had failed. These unsuccessful proposals are significant inasmuch as they manifest a common concern for securing to all persons equal protection of the law and protecting every person's natural or inalienable rights. They failed, not because of their objectives, but because their scope was too narrow to suit the majority of Republicans who felt the bill did little more than annul bad laws. *Buchanan,* at 15. What the Republicans sought, and eventually found in S. No. 61, was a bill that affirmatively protected for all persons certain enumerated rights. The rights Congress chose to enumerate are enlightening—*i.e.*, the rights to make and enforce contracts, to inherit, purchase, and lease, and,

finally, the right to the full and equal benefit of all laws and proceedings for the security of persons and property. This enumeration reveals that a major thrust of the 1866 Act was equal protection under the law and equality of economic opportunity for black and white persons alike, *Buchanan* at 16.

On January 12, 1866, the Senate began consideration of S. No. 61 as a Committee of the Whole. At that time, Senator Trumbull explained that the bill declared that:

> [T]here shall be no discrimination in civil rights or immunities among inhabitants of any State or Territory of the United States on account of race, color, or previous condition of slavery; but the inhabitants of *every race and color* [shall have the same enumerated rights]. (Emphasis supplied)

Cong. Globe, 39th Cong. 1st Sess. 211 (1866).

Again, on January 30, 1966, another proponent of the bill, Senator Jacob M. Howard of Michigan, succinctly stated the purpose of the bill:

> Mr. President, I do not understand the bill which is now before us to contemplate anything else but this, that in respect to all civil rights . . . there is to be hereafter no distinction between the white race and the black race.

Cong. Globe, 39th Cong. 1st Sess. 504 (1866).

Quite obviously, to achieve the practical equality envisioned by the supporters of the bill, §1981 must be construed to protect white victims of invidious racial discrimination.

Even the opponents of the bill recognized the color blind nature of S. No. 61. For instance, in the course

of expressing concern over the incursion of the bill into the rights of the states, Senator Reverdy Johnson of Maryland explained the scope of the bill:

> Now, if I understand this bill, *it is not confined to persons of African descent*. The language of the first section is: [quoting]
>
> That is to say, that no state shall discriminate at all between any inhabitants within her limits on account of any race to which they may belong, *whether white or black*, on account of color, if they are not white, or on account of their having been previously in a state of slavery, *so that the white as well as the black is included in this first section.* . . . (Emphasis supplied)

Cong. Globe, 39th Cong. 1st Sess. 505 (1866).

A clearer pronouncement that the bill was intended to protect white persons is difficult to imagine, unless it can be found in the remarks of Senator Lyman Trumbull, the author of the bill. In response to a "long harangue" from Senator Davis of Kentucky, Senator Trumbull rose to declare unequivocably that white persons were indeed covered by the bill:

> Sir, *this bill applies to white men as well as black men*. It declares that all persons in the United States shall be entitled to the same civil rights, the right to the fruit of their own labor, the right to make contracts, the right to buy and sell, and enjoy liberty and happiness; and that is abominable and iniquitous and unconstitutional! Could anything be more monstrous or more abominable than for a member of the Senate to rise in his place and denounce with such epithets as these a bill, the only object of which is to secure equal rights to all citizens of the country, *a bill that protects a white man just as much as a black man?* With what consistency and with what face can a Senator in his place here say to the Senate and the country that this is a bill for the benefit of black men exclusively when there is no such distinction in it and when *the very object of the bill is to breakdown all discrimination between black men and white men?* (Emphasis supplied)

Cong. Globe, 39th Cong. 1st Sess. 599 (1866).

Without a doubt then, both sides understood that S. No. 61 was intended to protect both white and non-white victims of invidious racial discrimination, and with that understanding, the bill passed the Senate on February 2, 1866 by the substantial margin of 33 yeas to 12 nays. Of course, the above quoted remarks were made before the House added the words "as is enjoyed by white citizens" but an examination of the debates in the House *after* the phrase was added discloses that the House of Representatives, likewise, thoroughly intended white persons to be protected by the bill.

On May 2, 1866, Senate Bill 61 was introduced to the House by Representative James F. Wilson of Iowa, Chairman of the House Judiciary Committee. After offering several committee amendments which were adopted without debate, Mr. Wilson personally offered the amendment which contained the phrase "as is enjoyed by white citizens". In support of the amendment, which was again adopted without discussion, Mr. Wilson simply stated that the change was necessary to perfect the amendment as already offered, Cong. Globe, 39th Cong. 1st Sess. 1115 (1866). During his remarks on the bill immediately following the amendments, Mr. Wilson reaffirmed the theme established in the Senate that the bill was intended to protect the fundamental rights of all men:

> Mr. Speaker, if all our citizens were of one race and one color, we would be relieved of most of the difficulties which surround us. This bill would be almost, if not entirely, unnecessary, and if the State, seeing that we have citizens of different races and colors, would but shut their eyes to these differences and legislate so far at least as regards civil rights and immunities, as though all citizens were of one race and color, our troubles as a nation would be well-nigh over. But such is not the case, and *we must do as best we can to protect our citizens, from the highest to the lowest, from the whitest to the blackest, in the enjoyment of the great fundamental rights which belong to all men.* (Emphasis supplied)

Cong. Globe, 39th Cong. 1st Sess. 1118 (1866).

Just over a week after Chairman Wilson made this statement, he yielded some of his floor time to Representative Samuel Shellabarger of Ohio, who said of the bill:

> It secures—not to all citizens, *but to all races* who are citizens—equality of protection in those enumerated civil rights which the states may deem proper to confer upon any races. (Emphasis supplied)

Cong. Globe, 39th Cong. 1st Sess. 1293.

Once again, the protection of white persons being firmly established, the bill was passed—again by an overwhelming vote—211 yeas and 38 nays. *Id.* at 1367. When the civil rights bill was returned for the concurrence of the Senate, the additional, "as is enjoyed by white citizens" verbage was completely discounted as making any change in the classes of persons protected by the bill. The question was raised by Senator Van Winkle of West Virginia:

> MR. VAN WINKLE. There seems to be an incongruity in this language to which I wish to call the attention of the chairman of the committee. The clause commences with the words "and such citizens". As I understand those words, they include all persons who are or can be citizens, *white persons and all others.* The clause then goes on to provide that "such citizens of every race and color, without regard to any previous condition of slavery or involuntary servitude, shall have the same right to make and enforce contracts," & etc.. "as is enjoyed by white citizens". *It seems to me these words are superflous. The idea is that the rights of all persons shall be equal; I think the clause leaving out these words, would obtain the object.* This is merely a verbal criticism. I think the bill is incongruous in expression as it stands.
>
> *MR. TRUMBULL. I quite agree with the Senator from West Virginia that these words are superflous.* I do not think that they alter the bill. I think the bill would have been better without them, but they have been adopted by the House of Representatives. We did not think they altered the meaning of the bill; and we did not think it worth while to send the bill back just because these words were inserted by the House. They thought there was some importance in them and inserted them; *and as in the opinion of the committee which examined this matter, they did not alter the meaning of the bill,* the committee thought proper to recommend the concurrence, and I hope that the Senate will concur in it.
>
> *MR. VAN WINKLE.* It is a mere verbal correction that I suggested, and I am not at all strenuous about it; nor perhaps should I have made it had I been more aware that the attention of the committee had been called to it. (Emphasis supplied)

Cong. Globe, 39th Cong. 1st Sess. 1413 (1866).

With no other discussion, the Senate concurred in the House's "as is enjoyed by white citizens" amendment. Thus, the clear intendment of the bill, to protect whites as well as non-whites, remained unaltered through the amendatory process of both Houses.

While the civil rights bill enjoyed overwhelming support in Congress, it was not as well received by President Andrew Johnson. The bill was vetoed on May 27, 1866. When the bill was returned to Congress following the veto, proponents of the bill again had occasion to stress the importance and scope of the bill. In the House, Representative William Lawrence of Ohio, who had theretofore refrained from comment on S. No. 61, rose on April 7, 1866, to summarize the bill:

> I will not therefore attempt a full discussion of it now, but content myself with briefly presenting some of the grounds upon which I will again perform the proudest fact of my political life in voting to make this bill the law of the land.
>
> . . .
>
> This bill, in that broad and comprehensive philanthropy which regards all men in their civil rights as equal before the law, *is not made for any class or creed, or race or color, but in the great future that awaits us will, if it becomes a law, protect every citizen,* including the millions of people of foreign birth who will flock to our shores to become citizens and to find here a land of liberty and law. (Emphasis supplied)

Cong. Globe, 39th Cong. 1st Sess. 1833 (1866).

Thus, tracing the bill through both Houses conclusively demonstrates the surprising unanimity with which both Houses agreed that the 1866 Act protected white persons

if they were the victims of invidious racial discrimination. Congressman Lawrence's remarks accurately reflected the sentiment of the vast majority of both Houses, for two days later, on April 9, 1866, the House followed the lead of the Senate and overrode the President's veto. Never before had Congress overriden the veto on a major political issue, *W. Brock, An American Crisis,* 115 (1963).

C. 42 U.S.C. §1981, Should be Construed as Broadly as 42 U.S.C. §1982.

As noted above in Note 2, both 42 U.S.C. §1981 and 1982 were derived from §1 of the Civil Rights Act of 1866. By their terms, both statutes undoubtedly cover white persons in that § 1982 applies to all citizens[46] while § 1981 protects a still broader class of all *persons.*

In light of the historical relationship between §§ 1981 and 1982, this Court has recognized that they should be construed consistently. *Tillman v. Wheaton-Haven Recreation Ass'n., Inc.,* 410 U.S. 431, 439-40 (1973). When construing the language of § 1982, this Court noted that the statute was written in "plain and unambiguous terms", *Jones v. Alfred H. Mayer Co.,* 392 U.S. 409, 420 (1968), and refused to believe that the broad language of the 1866 Act "was a mere slip of the legislative pen", *Id.* at 427. Rather the Court quoted with approval *United States v. Price,* 383 U.S. 787, 801 (1965) wherein it was stated:

> We think that history leaves no doubt that, if we are to give [the law] the scope that its origins dictate, we must accord it at a sweep as broad as its language.

Jones v. Alfred H. Mayer, Co., 392 U.S. at 437.

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46. § 1982. Property rights of citizens.
All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property.

After an extensive examination of the legislative history of the Civil Rights Act of 1866, this Court in *Jones* recognized the sweeping nature of the protection afforded by the Civil Rights Statute by holding that:

> §1982 bars *all* racial discrimination, private as well as public, in the sale or rental of property, and that the statute, thus construed, is a valid exercise of the power of Congress to enforce the Thirteenth Amendment. (Emphasis in original).

492 U.S. at 413.

Based on its holding in *Jones,* this Court again dealt with the 1866 Act in *Sullivan v. Little Hunting Park, Inc.,* 396 U.S. 229 (1969). In that case, Sullivan, a white, leased his home to Freeman, a black. In conjunction with the lease, Sullivan also assigned to Freeman his membership shares in the respondent corporation which ran community recreation facilities. A membership share entitled the immediate family of the shareholder to use the corporation's recreation facilities. Because of Freeman's race, the corporation refused to approve Sullivan's transfer of membership. When Sullivan protested the refusal, he was accorded a hearing of the corporation's board and was expelled from the corporation. Sullivan and Freeman brought suit under 42 U.S.C. §§ 1981 and 1982 for injunctions and monetary damages. On these facts, this Court held that Sullivan, the white, had standing to sue. 392 U.S. at 237. While the rationale of the Court was expressed in terms of § 1982, there is nothing in the opinion that limits Sullivan's standing to sue to § 1982 alone; and since § 1981 is the "statutory twin" of § 1982, *Macklin v. Spector Freight Systems, Inc.,* 478 F.2d 979, 994 (D.C. Cir. 1973), the holding in *Sullivan* must be

deemed to be a recognition that white persons have standing to sue under § 1981 as well.

In *Tillman v. Wheaton-Haven Recreation Assoc. Inc., supra,* this Court confirmed the standing of a white person to sue under §§ 1981 and 1982 when that person has suffered the consequences of racial discrimination directed against blacks. There, a white husband and wife, the Tillmans, invited a black guest, Mrs. Rosner, to a community swimming pool operated by the respondent corporation. After admitting Mrs. Rosner on one occasion, the association promptly changed its policy to limit guests to relatives of members. Based on the subsequent refusal of the association to admit Mrs. Rosner to the pool, the Tillmans and Mrs. Rosner sought damages and declaratory and injunctive relief under 42 U.S.C. §§ 1981 and 1982. It bears emphasis, that even more strongly than in *Sullivan,* the white petitioners in *Tillman* were asserting their own property rights under § 1982 as well as their contract rights under § 1981, since when it refused to admit Mrs. Rosner, Wheaton-Haven substantially reduced the value of the Tillmans' membership rights. In remanding on the question of relief, the Court left untouched the white petitioners' claim under § 1981 stating that the reasoning supporting the court's rejection of Wheaton-Haven's defense, that it was exempt from § 1982 as a private club, applied equally to § 1981. Viewed realistically, *Sullivan* and *Tillman* firmly establish a white plaintiff's standing to sue under § 1981 when that person's contract rights are impaired by racial discrimination directed at blacks, see *Buchanan* at 858-59.

Even though this Court has never directly held that white plaintiffs have standing to sue under §1981 when they are the object of racial discrimination, it has gone to

the very brink of such a holding in *Sullivan* and *Tillman*. A refusal to take the logical step now would create the anomalous situation where one white person, economically damaged by racial discrimination directed at blacks may recover for those damages, while another white person who endures *both* the humiliation of discrimination *and* resulting economic damage is left without remedy. Most assuredly the one thing a white victim of discrimination will be left with is the bitter realization that were his skin darker, he would have been made whole. To say the least, this unseemly result taxes one's sense of justice.

D. The Better Reasoned Lower Federal Court Opinions Have Consistently Recognized that §1981 Covers Whites as well as Non-Whites.

As early as 1905, lower Courts recognized that statutes derived from the 1866 Act are to be interpreted to apply to white persons as well as non-whites. *See, Kentucky v. Powers*, 139 F. 452, 494-95. (Cir. Ct. E.D. Ky. 1905). But of the lower court decisions addressing the question of whether a white plaintiff can sue under §1981 when subjected to invidious racial discrimination,, *Hollander v. Sears, Roebuck & Co., supra,* stands out as a singularly well studied opinion. In that case, the defendant was conducting interviews for its summer internship but denied the plaintiff an interview solely because he was white and not a member of a minority group. Finding the legislative history of the 1866 Act to be of prime importance in determining the scope of §1981, the court in *Hollander* conducted an extensive examination and found that, "In light, then, of this legislative history, it is quite clear that §1981 should not be read as only providing a cause of action for non-whites". 392 F. Supp. at 94.

The court then squarely held that white plaintiffs may have a cause of action under §1981 when they are the object of racial discrimination within the scope of activities protected by §1981. *Id.*

Two other cases holding that white persons had stated a cause of action under §1981, *Gannon v. Action,* 303 F. Supp. 1240 (E.D. Mo. 1969); and *Central Presbyterian Church v. Black Liberation Front,* 303 F.Supp. 894 (E.D. Mo. 1969), involved essentially identical facts. In these cases, black activists conducted on-going disruptions of predominantly white churches in order to press their demands for financial and other aid to blacks. In both cases, the court found that the white plaintiffs had stated a cause of action under §1981 since the black protesters had violated the right of the plaintiff Church and its members to equal benefit of laws for the security of property as guaranteed by §1981. *See, Gannon* at 1244-45 and *Central Presbyterian Church* at 901. In so holding, the court in *Central Presbyterian Church* noted that:

> While the Court recognizes the fact that these statutes [§§1981 and 1982] were passed primarily to insure the rights of non-white Americans, nothing in the statutes limit their application to cases where the civil rights of non-whites are being violated. Indeed, it would be unfair to deprive white Americans of the benefit of these sections when their constitutionally protected rights are being violated.

303 F. Supp. at 899.

In *WRMA Broadcasting Co., Inc. v. Hawthorne*, 365 F. Supp. 577 (D.C. Ala. 1973), the plaintiffs charged that the defendants, motivated by racial prejudice, were

conspiring to force the discharge of the white manager of radio station WRMA. Charging that the defendants, black employees of WRMA, were violating 42 U.S.C. §§1981 and 1985(3), the plaintiffs sought a preliminary injunction to enjoin defendants from threatening commercial advertisers on WRMA with a boycott and picketing of their stores unless they agreed to cease advertising on WRMA. In the course of deciding whether plaintiffs had established a probable right to relief, the court addressed the question of whether a white plaintiff may sue under §1981. *Id.* at 365 F. Supp. 580. Examining the constitutional basis of §1981, the court held that whites do indeed have standing to sue under §1981 stating:

> While in the past it might have been thought, as a conceptual matter, that the Thirteenth Amendment granted power to Congress to provide for the civil rights of blacks only, and not of whites, this conclusion is not necessary and is not even logical. Congress, pursuant to the Thirteenth Amendment, could and did provide in the reconstruction civil rights statutes that the rights of blacks should be the same as the rights of whites. It is reasonable to assume that Congress, in acting to secure the rights of all persons against racial discrimination, could pass general laws providing that all races shall be treated equally in certain respects. Under such a general statute, it is entirely proper that a white citizen could benefit incidentally from the elimination of badges and incidents of slavery. Obviously most racially-motivated deprivations of civil rights are and have always been aimed at blacks. However, in those rare instances when a white alleges racial discrimination under Section 1981, it is entirely consonant with the purpose of Section 1981, that whites discriminated against for racial reasons should have standing under Section 1981, and the power of Con-

> gress so to provide is a power ancillary to the enabling clause of the Thirteenth Amendment.

365 F. Supp. at 581, *Cf. Walker v. Pointer,* 304 F. Supp. 56, 60 (N.D. Tex. 1969).

Upon examining the above decisions, it is readily apparent that those courts holding that whites have a cause of action under §1981 when they are subjected to racial discrimination have done so only after a careful analysis of the Thirteenth Amendment basis of the statute, a thoughtful reading of statute and, most recently in *Hollander v. Sears, Roebuck & Co., supra,* a detailed examination of the legislative history of the 1866 Act. On the other hand, those cases cited for the opposite proposition, have not been so carefully reasoned. Even a cursory examination of those cases cited by the Fifth Circuit in support of its denial of petitioner's standing to sue under §1981 reveals that those holdings were founded upon superficial analysis, or are obviously distinguishable from the case at bar.

For instance, the court in *Van Hoomissen v. Xerox Corp.,* 369 F. Supp. 829 (N.D. Cal. 1973), denied the white plaintiff standing to sue under §1981, not because it felt that the statute did not protect whites, but rather because the detriment suffered by the plaintiff was not *due to his race.* In that case, the plaintiff merely alleged that he was fired in retaliation for attempting to change the hiring policy of Xerox which the plaintiff felt discriminated against Mexican-Americans. Clearly, the motivation for the discharge was not the plaintiff's race but his advocacy of a clause. See, 368 F. Supp. at 838-39. And just as clearly, *Van Hoomissen* cannot therefore, be regarded as a refusal to grant white persons, as a class,

standing to sue under §1981 when they are the object of racial discrimination.

Likewise, the case of *Kurylas v. U.S. Dept. of Agriculture*, 373 F. Supp. 1072 (D. D.C. 1974) aff'd., 514 F.2d 894 (D.C. Cir., 1975)[47] is readily distinguishable. There, the white plaintiff sued under §1981 alleging discrimination based on his *national origin*—not his race. The dispute in that case centered around a low job-performance rating given Dr. Kurylas, a veterinarian, because of his low score on a segment of the evaluation addressed to oral communication ability. The court's holding in *Kurylas* leaves no doubt that the plaintiff's claim under §1981 was denied because it was predicated upon a charge of discrimination based on national origin. Indeed, the court noted that white persons had been permitted to bring an action under §1981 where the complaints alleged a *racially* motivated infringment of their rights, *Id.* at 1074-75.

Perkins v. Banster, 190 F. Supp. 98 (D. Md. 1960), aff'd, 285 F.2d 426 (4th Cir. 1960) was a *pro se* action under 42 U.S.C. §§1981 and 1983 where a white plaintiff indicated that his claim was for "false arrest or false indictment or malicious prosecution or denial of due process and also for slander". *Id.* at 99. Ruling orally on what it obviously considered a vexatious suit, one in which the court expressed fear that the plaintiff might perjure himself, the court dismissed the action under §1981 in two sentences of the opinion stating that the court read

47. The district court's decision was affirmed without opinion. An explanatory memorandum accompanied the judgment of the circuit court, however the memorandum was not published inasmuch as it should not be cited in briefs of counsel as precedent. See, 514 F.2d 894.

§1981 to apply only to non-whites. *Id.* at 99. The Fourth Circuit affirmed *per curiam* based on the district court's opinion. From an honest reading of the district court's opinion, it is apparent that the court's ruling was guided more by the frivolous nature of the suit than upon careful analysis of the point of law involved. Plainly, the true deficiency of the plaintiff's cause of action in *Perkins* was not that the plaintiff was white, but that no allegation of *racial* discrimination was made. Viewed in the proper light, the rationale of *Perkins* must be regarded as an unfortunate concession to a crowded docket.

Another case cited by the court below for the proposition that white persons do not have standing to sue under § 1981 is *Ripp. v. Dobbs Houses, Inc.*, 366 F. Supp. 205 (N.D. Ala. 1973). Inasmuch as *Ripp* relies on *Perkins*, it too must be deemed to be unsound in reasoning.

As demonstrated above, § 1981 was undeniably intended by Congress to protect white plaintiffs. Yet, guided by an incautious examination of the above cited cases and without the benefit of the legislative history of §1981, the courts below rendered § 1981's promise of racial equality of *all* persons empty and meaningless.

As our American society continues its movement towards racial equality it seems inevitable that more instances of racial discrimination directed at white persons will appear. To give § 1981 a "blacks only" construction in the face of this reality would be peculiarly unjust, and would almost certainly intensify existing racial tension. Moreover, such a construction would result in the absurd situation where § 1981, the very purpose of which was to end racial discrimination, itself becomes a vehicle whereby racial discrimination is perpetuated.

On the other hand, a construction of § 1981 giving white persons standing to sue would not only be consonant with the intent of the Congress that passed the Civil Rights Act of 1866, but would be a progressive recognition of the needs of this Country in the years ahead. For the foregoing reasons, Petitioners respectfully submit that the decision of the court below should be reversed and remanded for a trial on the merits.

III.

ALLOWING WHITES STANDING TO REDRESS INVIDIOUS NON-REMEDIATING DISCRIMINATION UNDER TITLE VII, AND 42 U.S.C. §1981 WILL NOT INTERFERE WITH THE SALUTORY PURPOSES OF AFFIRMATIVE ACTION.

Many persons fear that a holding that white persons have standing to sue under Title VII and § 1981 will spell the demise of "Affirmative Action". This simply is not true. Indeed, Petitioners recognize the importance of affirmative action in the achievement of social justice and to the development of a racially harmonious industrial society.

Affirmative action is the remedial relief necessary to redress the present effects of past discrimination.[48] *Swann v. Charlotte-Meeklenberg Board of Education,* 402 U.S. 25 (1971); *United States v. International Brotherhood of Electrical Workers, No. 38,* 428 F.2d 144 (6th Cir. 1970), cert. denied, 400 U.S. 943 (1970). Accordingly, once a violation of Title VII or § 1981 is established, a District Court may impose hiring goals as a remedy. *United States v. Lathers Local 46,* 471 F.2d 408 (2d

48. Cf. *Karst and Horowitz, Affirmative Action and Equal Protection,* 60 U. Va. L. Rev. 955, 964 (1974).

Cir.), cert. denied, 412 U.S. 939 (1973); *United States v. Ironworkers Local 86,* 443 F.2d 544 (9th Cir.) cert. denied, 404 U.S. 984 (1971); *Contractors Assn of E. Pa. v. Secretary of Labor,* 442 F.2d 159 (3d Cir.), cert denied, 404 U.S. 854 (1971). See also, *Rios v. Enterprise Association Steamfitters Local 638,* 520 F.2d 352 (2d Cir. 1975). Whether called quotas, numerical objectives[49], freezing[50] or mathematical ratios[51], their laudatory purposes remain the same and have been recognized by this Court as mere starting points in the process of shaping remedies, rather than inflexible requirements. *Swann, supra.*

But such is not the case here. The racial discrimination to which Petitioners were subjected has never been justified by Respondent as a measure to improve the status of minorities within the Santa Fe Transportation Company. It simply constitutes invidious racial discrimination; that is, discrimination not justified by a compelling need to remedy past wrongs.

The question presented then becomes whether a white victim of invidious, non-remediating discrimination, is to be left defenseless in a situation where a black person would clearly have a cause of action. Petitioners submit that to answer this question in the affirmative would only serve to further polarize black and white America. A racially polarized Country will be incapable of delivering one of the great promises of America's third century—equal employment opportunities for all.

49. *Southern Illinois Builders Association v. Ogilvie,* 471 F.2d 680 (7th Cir. 1972).

50. *Robinson v. Lorillard Corp.,* 444 F.2d 791 (7th Cir. 1971) cert. dismissed 404 U.S. 1006 (1972).

51. *Swann v. Charlotte Meeklenberg Board of Education, supra.*

CONCLUSION

In finding that Petitioners had failed to state a claim upon which relief could be granted, the court below committed a serious omission which has operated to deprive Petitioners of those very rights which Title VII and 42 U.S.C. § 1981 were enacted to secure. For this reason, and the reasons stated in this brief, this Court should reverse the lower court's decision and remand with instructions that the matter proceed to trial on the merits.

Respectfully submitted,

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APPENDIX A

APPENDIX "A"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 75-2158

HOWARD HABER,
Plaintiff-Appellant

v.

E. T. KLASSEN, ET AL.,
Defendants-Appellees.

SUGGESTION OF REMAND

Defendants-Appellees respectfully suggest that this Court remand this cause to the district court. In the view of the appellees, this case was decided upon an erroneous ground by the district court, and consequently should be remanded.

1. This is an action alleging employment discrimination brought by a white male Postal Service employee against the federal government under 1972 amendments to Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-16. The district court on June 30, 1975, issued a memorandum opinion and order granting the government's motion for summary judgment. The court held that white persons could not obtain relief for racial discrimination under Title VII:

> The plaintiff in this case claims that he, a member of the white race, was discriminated against because of his race, and further alleges that he is entitled

> to relief under § 2000e-16. However, true the former proposition, the latter is false. Members of the white race may not seek relief for racial discrimination under Title VII, and thus defendants are entitled to judgment.

Opinion at 3. The court made no alternative findings with regard to whether the record showed that plaintiff was discriminated against or not.

2. The court's holding improperly construes the Civil Rights Act. 42 U.S.C. § 2000e-16(a) expansively provides that all federal personnel actions "shall be made free from any discrimination based on race, color, religion, sex, or national origin." Discrimination against whites is certainly discriminaton based on race and color. See, e.g., *Parks v. Dunlop,* C.A. 5, No. 75-1786, decided August 13, 1975; *Phillips v. Columbia Gas of West Virginia, Inc.,* 347 F. Supp. 533 (S.D. W.Va., 1972), aff'd *per curiam,* 474 F.2d 1342 (C.A. 4, 1973); *United States v. International Longshoremen's Assoc.,* 334 F. Supp. 976, 979 (S.D. Texas 1971), rev'd on other grounds *sub nom. EEOC v. International Longshoremen's Assoc.,* 511 F.2d 273 (C.A. 5, 1975); *Smith v. Gunther,* 9 EPD ¶ 9915 (D. D.C. 1975); *Leinster v. Engman,* 8 EPD ¶ 9774 (D. D.C. 1974).

None of the authority cited by the district court supports the conclusion that whites are not entitled to protection from racial discrimination under Title VII. In *Trafficante v. Metropolitan Life Ins. Co.,* 409 U.S. 205 (1972), which involved housing rather than employment discrimination, the discrimination affording relief in that case was discrimination against nonwhites, but the Court never explicitly or implicitly indicated that discrimination against whites would not be a basis for affording relief.

In *Griggs v. Duke Power Co.,* 401 U.S. 424 (1971), while the Court stated that the Congressional objective was

> to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees,

401 U.S. at 429-30, the Court also stated,

> [d]iscriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed.

401 U.S. at 431. Finally, while the Supreme Court in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802 (1973) indicated that belonging to a racial minority may be a step in making a *prima facie* case of racial discrimination, the Court carefully noted that different standards for making a *prima facie* case may apply in different factual situations. 411 U.S. at 802 n. 13. The district court in the instant case was thus in error in holding that whites are not protected from race discrimination under Title VII of the Civil Rights Act.

3. Inasmuch as the Title VII federal employee provisions contemplate review of the administrative record in the first instance by the district court, a remand is appropriate in this case to permit the district court properly to make a determination in the first instance as to whether the administrative record showed discrimination.

4. Counsel for plaintiff, Mr. Harry L. Haber, has authorized us to state that he concurs in the remand of this case to the district court.

Accordingly, appellees respectfully suggest to this Court that this cause be remanded to the district court.

Respectfully submitted,

/s/ Robert E. Kopp
ROBERT E. KOPP

/s/ John M. Rogers
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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of October, 1975, I served the foregoing Suggestion of Remand by causing a copy to be mailed, air mail, postage prepaid to:

Harry L. Haber, Esquire
1422 Som Center Road
Mayfield Hts., Ohio 44124

/s/ John M. Rogers
JOHN M. ROGERS,
Attorney.